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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

IRVIN BOJORQUEZ LONGORIA,

Defendant and Appellant.

H045593

(Santa Cruz County

Super. Ct. No. 17CR02214)

I. INTRODUCTION

After his motion to suppress was denied, defendant Irvin Bojorquez Longoria pleaded no contest to possession of a methamphetamine for sale (Health & Saf. Code, § 11378). The trial court placed defendant on probation for three years with various terms and conditions, including that defendant submit electronic devices under his control to search and seizure without a warrant for evidence of drugs and drugs sales and that he provide law enforcement with the passwords for the electronic devices (electronics search condition).

On appeal, defendant contends that: (1) his counsel rendered constitutionally deficient assistance when she failed to renew defendant's motion to suppress in the superior court, and (2) the electronics search condition is unconstitutionally overbroad.

For reasons that we will explain, we will affirm the judgment.¹

II. BACKGROUND

A. *Factual Background*

At approximately 7:51 p.m. on April 18, 2017, Watsonville Police Sergeant Eric Montalbo observed a vehicle stopped at a red light past the intersection's limit line with its headlights off. It was overcast and the lighting conditions were poor. Other cars had their headlights on, as did Sergeant Montalbo. Due to the conditions, Sergeant Montalbo believed there was not enough visibility to clearly discern a pedestrian or a vehicle from 1,000 feet.

Based on his observations, Sergeant Montalbo effected a traffic stop on the vehicle. Sergeant Montalbo contacted defendant and smelled burned marijuana coming from inside the car. Sergeant Montalbo asked defendant whether he had a driver's license, and defendant stated that he did not. Sergeant Montalbo had defendant step out of the vehicle and confirmed through a records check that defendant was unlicensed. Sergeant Montalbo asked defendant for consent to search his person and his vehicle and defendant agreed.

Sergeant Montalbo found approximately 4.7 grams of crystal methamphetamine, approximately 2.6 grams of marijuana, \$300, and a marijuana pipe in defendant's pants pockets and approximately 2.4 grams of cocaine, 59 grams of methamphetamine, a fixed-blade knife, a cell phone, \$185, and a methamphetamine pipe in defendant's car. Defendant was placed under arrest and taken to the police station. After defendant was read and waived his *Miranda*² rights, defendant stated that all of the drugs were his and admitted selling approximately \$600 of methamphetamine a day.

¹ Defendant's appellate counsel has filed a petition for writ of habeas corpus, which this court ordered considered with the appeal. We have disposed of the habeas petition by separate order filed this day. (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

² *Miranda v. Arizona* (1966) 384 U.S. 436.

B. *Procedural Background*

Defendant was charged with possession of more than two ounces of methamphetamine for sale (Health & Saf. Code, § 11378; Pen. Code, § 1203.073, subd. (b)(2)),³ misdemeanor possession of cocaine (Health & Saf. Code, § 11350), misdemeanor possession of an injection or ingestion device (Health & Saf. Code, § 11364, subd. (a)), and misdemeanor driving without a license (Veh. Code, § 12500, subd. (a)). Defendant subsequently filed a motion to suppress evidence, arguing that the vehicle stop and subsequent search were unlawful.

The magistrate heard the motion to suppress in conjunction with the preliminary hearing. The magistrate found that there was “not a violation of the limit line requirement,” but that “[t]he lighting [was] much more ambiguous I can’t tell what the real lighting is . . . based on the view that I have and the amount of lighting. I would have to say that it appears to me it would be difficult to see a human a thousand feet away.” The magistrate determined that “[i]t’s hard to see some of the cars except for the ones that have their lights on. So I’m going to deny the motion on the basis of the lighting”

The prosecution filed an information charging defendant with the same offenses alleged in the complaint. Pursuant to a negotiated plea agreement, defendant pleaded no contest to possession of methamphetamine for sale and the trial court dismissed the remaining charges at the prosecution’s request. The trial court placed defendant on probation for three years with various terms and conditions.

III. DISCUSSION

A. *Ineffective Assistance of Counsel*

As defendant acknowledges, a defendant must seek review of a magistrate’s suppression ruling in the superior court in order “to preserve the point for review on

³ All further statutory references are to the Penal Code unless otherwise indicated.

appeal.” (*People v. Lilienthal* (1978) 22 Cal.3d 891, 896 (*Lilienthal*); see also *People v. Hoffman* (2001) 88 Cal.App.4th 1, 3 [“court unification did not affect the *Lilienthal* mandate”].) Defendant contends that his counsel provided constitutionally deficient assistance because she neglected to renew defendant’s motion to suppress in the superior court. The Attorney General declines to address defendant’s ineffective assistance of counsel claim on the merits, arguing that it is nonreviewable because defendant lacks a certificate of probable cause and an adequate record.

The California Supreme Court has stated the procedural requirements for appealing a judgment of conviction entered on a plea of guilty or no contest. “[S]ection 1237.5 provides that a defendant may not take an appeal from a judgment of conviction entered on a plea of guilty or nolo contendere unless he [or she] has filed in the superior court a statement of certificate grounds, which go to the legality of the proceedings, including the validity of his [or her] plea, and has obtained from the superior court a certificate of probable cause for the appeal. [Citation.]” (*People v. Mendez* (1999) 19 Cal.4th 1084, 1095 (*Mendez*); see also *In re Chavez* (2003) 30 Cal.4th 643, 650 (*Chavez*).) California Rules of Court, rules 8.304(a) and (b) and 8.308⁴ implement section 1237.5 by providing that a defendant may not take or prosecute an appeal after a plea of guilty or no contest unless he or she has filed a notice of appeal from the judgment as well as a statement of certificate grounds within 60 days after rendition of judgment, and has obtained a certificate of probable cause for the appeal within 20 days after filing of the statement. (See *Mendez, supra*, at p. 1095 [discussing former rule 31(d)]; *Chavez, supra*, at p. 650 [same].) Unless the defendant complies with these rules, the superior court must treat the purported appeal as “ ‘[i]noperative.’ ” (Rule 8.304(b)(3).)

⁴ All further rule references are to the California Rules of Court.

A defendant may take an appeal without a statement of certificate grounds or a certificate of probable cause if he or she does so “solely on noncertificate grounds, which go to postplea matters not challenging [the] plea’s validity and/or matters involving a search or seizure whose lawfulness was contested pursuant to section 1538.5. [Citations.]” (*Mendez, supra*, 19 Cal.4th at p. 1096.) However, to do so, the defendant must state in his or her timely filed notice of appeal that the appeal is based on one or both of the noncertificate grounds. (Rule 8.304(b)(4).) And, if the notice of appeal contains such a statement, the reviewing court will not consider any issue affecting the validity of the plea unless the defendant has also filed a statement of certificate grounds and obtained a certificate of probable cause. (Rule 8.304(b)(5); see *Mendez, supra*, at p. 1096.)

In sum, a defendant may not obtain review of certificate issues unless he or she has complied with section 1237.5 and rules 8.304(a) and (b) and 8.308. “[U]nder section 1237.5 and [the applicable rules], the Court of Appeal generally may not proceed to the merits of the appeal, but must order dismissal thereof, unless the defendant has filed a statement of certificate grounds [and] an intended notice of appeal within 60 days after rendition of judgment, and has obtained a certificate of probable cause within 20 days after filing of the statement and, hence within a maximum of 80 days after rendition of judgment. [Citations.]” (*Mendez, supra*, 19 Cal.4th at p. 1096.)

In *Mendez*, the California Supreme Court instructed that “section 1237.5 and [the applicable rules] should be applied in a strict manner.” (*Mendez, supra*, 19 Cal.4th at p. 1098.) “Therefore, the defendant may not obtain review of certificate issues unless he has complied with section 1237.5 and [the applicable rules], fully, and, specifically, in a timely fashion—that is to say, unless he has done what they require, how they require, and when they require. Plainly, he has not complied with them fully unless he has complied with them in a timely fashion. For, as indicated, their demands extend beyond *what* and *how* to *when*. If he has complied only ‘substantially,’ he has not complied

sufficiently; and if he has not complied sufficiently, he has not complied at all.

[Citation.]” (*Id.* at p. 1099; see also *Chavez, supra*, 30 Cal.4th at p. 651.)

In the present case, defendant did not obtain a certificate of probable cause. Instead, he filed an amended notice of appeal stating that the appeal is based on the denial of a motion to suppress evidence under section 1538.5.⁵ Recognizing that pursuant to *Lilienthal, supra*, 22 Cal.3d at page 896, he waived the suppression issue by failing to raise it in the superior court, defendant seeks review of the magistrate’s ruling by way of an ineffective assistance of counsel claim.

We follow the guidance of our Supreme Court in determining whether defendant was required to obtain a certificate of probable cause in order to raise the issue of ineffective assistance of counsel on appeal. “In determining whether section 1237.5 applies to a challenge of a sentence imposed after a plea of guilty or no contest, courts must look to the substance of the appeal: ‘the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made.’ [Citation.] Hence, the critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5.” (*People v. Panizzon* (1996) 13 Cal.4th 68, 76.)

Here, defendant’s ineffective assistance of counsel claim is based on his trial counsel’s failure to renew the suppression motion in the superior court prior to the entry of defendant’s no contest plea. The substance of his claim is therefore a challenge to the validity of his plea. (See *People v. Richardson* (2007) 156 Cal.App.4th 574, 596.) Accordingly, defendant’s ineffective assistance of counsel claim constitutes a certificate issue that must be rejected pursuant to section 1237.5 and the applicable rules because

⁵ Defendant’s initial notice of appeal stated the appeal is based on the sentence or other matters occurring after the plea that do not affect the plea’s validity and on the denial of a motion to suppress evidence under section 1538.5.

defendant failed to obtain a certificate of probable cause. (See *Richardson, supra*, at p. 596.)

For these reasons, we conclude that we must reject defendant's ineffective assistance of counsel claim based on his failure to obtain a certificate of probable cause.

B. *Electronics Search Condition*

In granting probation and imposing certain probation conditions, the trial court ordered defendant to submit his "person, residence, vehicle, [and] anything under [his] control to search and seizure any time of the day or night by any peace officer, with or without a warrant, for drugs, drug paraphernalia, and evidence of sales activity." In addition, the court ordered defendant to provide his passwords to law enforcement so that his electronic devices could be searched "for evidence of sales."

Defendant challenges the electronics search condition, contending it is "unconstitutionally overbroad because it permits law enforcement access to data unrelated to illegal activities, such as romantic, financial, and political information."⁶ Defendant argues that the condition is unconstitutional because it "gives law enforcement authorities the ability to review a wide variety of private information that would not be even remotely relevant to whether or not [he] was complying with the conditions of his probation." Defendant asserts that "the trial court erred by failing to limit the types of data [and devices] that could be searched." (Capitalization and bold omitted.) The Attorney General counters that the condition "properly serves the state's interest in preventing [defendant] from using electronic devices to engage in criminal activity such as the sale of narcotics."⁷

⁶ Defendant challenges both the condition that he submit his electronic devices to search and the condition that he provide his device passwords to law enforcement. We refer to the conditions collectively as "the electronics search condition."

⁷ The Attorney General urges us not to address defendant's electronics search condition claim unless defendant moves to strike the amended notice of appeal because (continued)

We review the constitutionality of a probation condition de novo. (*In re Malik J.* (2015) 240 Cal.App.4th 896, 901.) Because defendant premises his constitutional overbreadth claim solely on the condition’s intrusion into his privacy, we understand him to contend that the condition infringes on his Fourth Amendment rights.

“A probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad. [Citation.]” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) “The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant’s constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.” (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

Significantly, a probationer “has a diminished expectation of liberty and privacy as compared to an ordinary citizen. [Citation.]” (*People v. Garcia* (2017) 2 Cal.5th 792, 810.) “Inherent in the very nature of probation is that probationers ‘do not enjoy “the absolute liberty to which every citizen is entitled.” ’ [Citation.] Just as other

the amended notice does not state that defendant is appealing from matters occurring after the plea that do not affect the plea’s validity. Unlike the initial notice of appeal, which stated that the appeal is based on the sentence or matters occurring after the plea that do not affect the plea’s validity *and* on the denial of the motion to suppress, the amended notice states solely that the appeal is based on the denial of the motion to suppress.

“The notice of appeal must be liberally construed.” (Rule 8.304(a)(4).) “If the notice of appeal . . . contains a statement of noncertificate grounds, the appeal is ‘operative[]’ . . .” (*People v. Jones* (1995) 10 Cal.4th 1102, 1110, overruled on another point in *Chavez, supra*, 30 Cal.4th at p. 656.) Although defendant did not ultimately pursue the ground stated in the amended notice, the appeal of a denial of a motion to suppress constitutes a noncertificate ground (see rule 8.304(b)), and the Attorney General does not contend that he was misled or prejudiced by the amended notice. Thus, we will reach the merits of the electronics search condition claim. (See *Mendez, supra*, 19 Cal.4th at p. 1096.)

punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.” (*United States v. Knights* (2001) 534 U.S. 112, 119 (*Knights*).)

“The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined ‘by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’ [Citation.]” (*Knights, supra*, 534 U.S. at pp. 118-119.) Defendant’s “status as a probationer subject to a search condition informs both sides of that balance.” (*Id.* at p. 119.)

In asserting that the electronics search condition significantly impacts his privacy rights, defendant relies on the United States Supreme Court’s decision in *Riley v. California* (2014) 573 U.S. 373 (*Riley*). In *Riley*, the court held that the warrantless search of a suspect’s cell phone implicated and violated the suspect’s Fourth Amendment rights. (*Riley, supra*, at pp. 401-402.) The court explained that modern cell phones, which have the capacity to be used as mini-computers, can potentially contain sensitive information about a number of areas of a person’s life. (*Id.* at p. 393.) The court emphasized, however, that its holding was only that cell phone data is subject to Fourth Amendment protection, “not that the information on a cell phone is immune from search.” (*Id.* at p. 401.)

Riley is inapposite because it arose in a different Fourth Amendment context. *Riley* involved the scope of a warrantless search incident to arrest of a person who had not been found to have committed a crime beyond a reasonable doubt and who was not granted probation. (*Riley, supra*, 573 U.S. at pp. 378-379.) The balancing of the state’s interests and the defendant’s privacy interests is very different in this case, which involves the probation of a convicted felon who possessed narcotics for sale. Moreover, *Riley* did not consider the constitutionality of conditions of probation, parole, or

mandatory supervision. Because persons on probation do not enjoy the absolute liberty to which law-abiding citizens are entitled, the court may impose reasonable conditions that deprive an offender of some freedoms. (*Knights, supra*, 534 U.S. at p. 119 [probationers]; see also *In re Q.R.* (2017) 7 Cal.App.5th 1231, 1238, review granted Apr. 12, 2017, S240222 [*Riley* involved a person’s “preconviction expectation of privacy”].)

Defendant urges us to narrow the electronics search condition imposed by the trial court. Echoing the concerns expressed in *Riley*, defendant argues that the condition gives law enforcement access to a wide variety of private information irrelevant to whether defendant is in compliance with the terms of his probation.

We determine, however, that the electronics search condition properly serves the state’s interest in preventing defendant from using electronic devices to engage in the sale of narcotics. “The minimal invasion of his privacy” associated with monitoring his electronic devices while he is on probation “is outweighed by the state’s interest in protecting the public from a dangerous criminal who has been granted the privilege of probation.” (*People v. Ebertowski* (2014) 228 Cal.App.4th 1170, 1176.) Moreover, we observe that the challenged condition restricts the permitted searches of defendant’s electronic devices by specifying the purposes for which searches may be conducted—“for drugs, drug paraphernalia, and evidence of sales activity.” Although defendant generally argues that the condition is overbroad, he does not explain how it should be further circumscribed in a way that would still serve the state interest identified above.

For these reasons, we conclude that the electronics search condition is not unconstitutionally overbroad.

IV. DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P. J.

MIHARA, J.

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